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Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

ROBERT D. PAPKIN
Counsel of Record, Member of the Bar of the Supreme Court of the United States

EDWARD W. SAUER
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 626-6601

Counsel for Appellants
Lineas Aereas Costarricenses, S.A., et al.

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QUESTIONS PRESENTED

1. Where foreign aircraft operating exclusively in foreign commerce take on fuel in Florida for use in international air transportation, may the State of Florida subject that fuel to an unapportioned excise tax when that tax prevents the Federal Government from speaking with one voice in regulating commercial relations with foreign governments, flatly contravenes the announced foreign policy of the United States, and creates a substantial risk of international multiple taxation?

2. May foreign airlines operating in foreign commerce be required to bear a fuel tax burden substantially heavier than that which the State imposes on operators of competing modes of transportation?

PARTIES TO THIS PROCEEDING

Lineas Aereas Costarricenses, S.A., and eight other foreign airlines that have intervened as plaintiffs in this matter ("Foreign Airline Appellants") appeal from a judgment of the Supreme Court of Florida that upheld the constitutionality of an unapportioned Florida excise tax on jet fuel purchased exclusively for use in foreign commerce. The complete names of all of the Foreign Airline Appellants, and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, are provided in Appendix I.

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STATE OF FLORIDA, DEPARTMENT OF REVENUE,
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On Appeal from the Supreme Court of the State of Florida

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Florida Supreme Court in this proceeding (Appendix A) is not reported. The opinions in the companion cases (Appendix B) referred to therein are reported as follows: *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984); *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984); *Department of Revenue v. Air Jamaica Ltd., et al.*, 455 So.2d 324 (Fla. 1984); *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984). The opinion of the Florida Supreme Court in the companion case of *Northeastern International Airways,*

Inc. v. Department of Revenue is not reported. The final judgment of the Second Circuit Court in and for Leon County, Florida (Appendix C) is also not reported.

JURISDICTION

On June 14, 1984, reversing a decision by the trial court, the Florida Supreme Court upheld the constitutionality of those portions of Chapter 212, Florida Statutes, which are the subject of this appeal. The Foreign Airline Appellants filed a Motion for Rehearing on June 27, 1984 (Appendix F), which was denied on September 12, 1984 (Appendix G). A Notice of Appeal was filed in the Florida Supreme Court on September 14, 1984 (Appendix H). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(2) (1982). *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AGREEMENT PROVISIONS

Fla. Stat. Ann. § 212.62(1) (West Supp. 1984) imposes a tax on consumers of "special fuels" (including aviation fuel) at a current rate of 5.7¢ per gallon.[1] Fla. Stat. Ann. § 212.08(4) (West Supp. 1984) (Appendix J), as revised effective April 1, 1983, requires that common carriers licensed by the Interstate Commerce Commission and vessels used to transport persons or property in interstate or foreign commerce pay this tax only on fuel they consume within the State of Florida. There is no corresponding provision for airlines.

Various international aviation agreements between the United States and the home countries of most of the Foreign Airline Appellants provide for the reciprocal exemption of airlines of both countries from national

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[1] Technically, the tax is imposed upon the fuel suppliers. However, those companies are required to pass the tax on to the Foreign Airline Appellants. Fla. Stat. Ann. § 212.62(2) (West Supp. 1984).

duties and charges on fuel.[2] Certain of the agreements also require the United States to use its best efforts to obtain exemptions for foreign airlines from state and local taxes on fuel.

The relevant provisions of the Constitution are the Commerce Clause (U.S. Const. art. I, § 8, cl. 3) and the Equal Protection Clause of the 14th Amendment. (U.S. Const. amend. XIV, § 1)

STATEMENT

For many years, the State of Florida has imposed excise taxes on fuel purchased by airlines within that State. Prior to April 1, 1983, the taxes were prorated on a mileage basis; only fuel consumed within the State of Florida was taxed. Discussing a parallel tax exemption, the Florida Supreme Court explained in *Tropical Shipping & Construction Co. Ltd. v. Askew*, 364 So. 2d. 433, 435 (Fla. 1978):

> The purpose of the partial tax exemption is to prevent the State from exceeding its powers to tax interstate and foreign commerce. The proration formula was designed so that Florida would only tax that portion of commerce activity that occurred within the State.

The proration feature was repealed, for airlines only, effective April 1, 1983.

Each of the Foreign Airline Appellants serves only one point in the State of Florida—Miami. Following normal airline routes, the Foreign Airline Appellants' aircraft travel only briefly in Florida air space. International airlines therefore paid little, or no, fuel tax prior to April 1, 1983.

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[2] The full citations of these agreements and their provisions directly relating to fuel taxes are set forth in Appendix K.

Senate Bill 8A, enacted in March of 1983, radically altered Florida's scheme of airline fuel taxation. It established a new excise tax applicable only to motor fuels and special fuels (*i.e.*, most fuels for vehicles and machinery other than gasoline). That tax was set at five percent of an artificial "price" established by legislative fiat at $1.148 per gallon (Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1984)). (Actual jet fuel prices have consistently been less than $1.00 per gallon in recent years. Appendix E at 57a.)

The mileage proration provision previously applicable to all common carriers, including airlines, was limited by the new law to carriers licensed by the Interstate Commerce Commission (principally railroads) and to vessels in interstate or foreign commerce. Finally, certain large Florida-based airlines were granted an income tax credit equal to part of the special fuels tax that they paid. (Fla. Stat. Ann. § 220.189 (West Supp. 1984)).

All of the Foreign Airline Appellants are airlines established under the laws of foreign countries and designated and licensed by those countries to provide international services to and from the United States. By law, they are forbidden to provide interstate or intrastate air transportation except under highly unusual circumstances. 49 U.S.C. app. § 1508(b) (1982).

The Foreign Airline Appellants all purchase significant quantities of aviation jet fuel at Miami International Airport, and are all therefore subject to the special fuels tax. All of the Foreign Airline Appellants are exempt from federal taxation of aviation fuel because of reciprocal exemptions provided to United States carriers by their home country governments.

Each of the Foreign Airline Appellants has its corporate headquarters in its home country. Each has been

found by the Civil Aeronautics Board to be substantially owned and effectively controlled by the government or nationals of its home country.

Aviation relations between the United States and the home countries of the Foreign Airline Appellants are governed by a number of multilateral aviation agreements.[3] In addition, each of the home countries of the Foreign Airline Appellants, with the exception of Honduras, has entered into a bilateral air transport services agreement with the United States. (Appendix K) Each of these agreements provides for exemptions from national duties and charges on aviation fuel on a basis of reciprocity. The aviation agreement between the United States and Costa Rica also calls upon the United States to exercise its best efforts to obtain exemption from state fuel taxes for Costa Rican carriers. Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a.

The Foreign Airline Appellants brought this action in the Second Circuit Court in and for Leon County, Florida, seeking declaratory and injunctive relief against the application of this tax to them. They first raised the constitutional issues presented herein in their complaints. Briefs on these issues were filed in the Circuit Court, and the issues were argued at hearing. The Circuit Court rejected arguments of the Foreign Airline Appellants based on Equal Protection and Commerce Clause standards. However, it found that the tax was inconsistent with the policies of the bilateral aviation agreements, and with international reciprocity in cases where no agree-

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[3] *See, e.g.: Convention on International Civil Aviation,* Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295; *Convention for the Unification of Certain Rules Relating to International Transportation by Air,* October 12 ,1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

ments applied. Accordingly, the Court enjoined collection of this tax from the Foreign Airline Appellants. (Circuit Court Decision, Appendix D)

The Department of Revenue (DOR) appealed that decision to the First District Court of Appeal, which, in turn, certified the question directly to the Florida Supreme Court (Appendix C). The Florida Supreme Court held that the income tax credit for Florida-based airlines was inconsistent with the Commerce and Equal Protection clauses, but severed that credit from the remainder of the statute. It upheld the rest of the fuel tax.[4] The Foreign Airline Appellants filed a Motion for Rehearing, which was denied on September 12, 1984. A Notice of Appeal to this Court was filed on September 14, 1984. The Foreign Airline Appellants are docketing that appeal today.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE DECISION BELOW IS TOTALLY INCONSISTENT WITH *JAPAN LINE, LTD. v. COUNTY OF LOS ANGELES*, 441 U.S. 434 (1979)

The question presented in *Japan Line* was whether it is constitutional for a State to impose a nondiscriminatory property tax on foreign-owned instrumentalities of international commerce. The question presented here is similar: whether it is constitutional for a State to impose a discriminatory tax on foreign-owned instrumentalities of international commerce. The answer the Court gave to the former question should, we submit, be controlling here.

Japan Line teaches that when a State seeks to tax an instrumentality of foreign commerce:

> . . . a Court must . . . inquire, first, whether the tax, notwithstanding apportionment, creates a sub-

[4] These determinations were made in *Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 31a, and then applied in this proceeding.

> stantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

441 U.S. at 451.

The Florida fuel tax fails both of these tests.

First, it impairs federal uniformity in an area where such uniformity is essential. This test—originally developed in *Japan Line*—was amplified in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933 (1983), where the Court identified two subtests: 1) whether a particular tax implicates foreign policy issues that must be left to the Federal Government, and 2) whether that tax violates a clear federal directive. *Id.* at 2955. The Florida Supreme Court ignored the first subtest and applied the second one incorrectly. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 36a-37a.

The consistent policy of the United States for many years has been that international airlines should be exempt from fuel taxes on the basis of reciprocity. This policy is expressed at the federal level through statutory provisions granting exemptions from otherwise applicable federal excise taxes. *See, e.g.*, 26 U.S.C. §§ 4221(a)(3), (e)(1) (1982). It is also reflected in specific provisions of bilateral executive agreements providing for reciprocal exemptions from tax (Appendix K). It is further recognized in some of the more recent executive agreements regarding international aviation, which commit the United States to use its best efforts to obtain reciprocal exemptions from state taxes for foreign airlines. *See,*

e.g., Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a.

Standing alone, each of these authorities would be strong evidence of the policy of the Federal Government in this area. However, there was even more direct evidence before the Florida courts in the form of an exchange of correspondence between the Federal Government and the Florida Department of Revenue regarding this very fuel tax.

In September of 1982, the Deputy Assistant Secretary of State for Transportation and Telecommunications wrote to the Florida Department of Revenue indicating that a number of foreign governments had recently questioned the appropriateness of imposing state and local taxes on purchases of fuel and other technical supplies by foreign carriers due to the long-standing international practice of reciprocally exempting such items from tax. The letter continued that:

> A few such governments have raised the possibility that State and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

Letter dated Sept. 29, 1982. Appendix L at 95a.

The DOR responded by reassuring the State Department that Florida tax law recognized the importance of foreign airlines and granted liberal exemptions to them. Letter dated Oct. 25, 1982. Appendix L at 97a-98a.

After learning of the provisions of Senate Bill 8A, the State Department wrote:

> . . . we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on

> aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, *this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines.* It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

Letter dated March 17, 1982 [*sic*]. Appendix L at 99a. (Emphasis supplied)

On the day of oral argument before the Florida Supreme Court, the Department of State, speaking on behalf of itself, the Department of Transportation, and the Civil Aeronautics Board, expressed this point in even more forceful terms:

> The United States is committed—by statute, international agreement and express policy—to a marketplace for international aviation governed, to the greatest extent possible, by competitive forces unaltered by governmental intervention. Foreign taxation of air carriers threatens an excessive tax burden on international transportation and restricted access to the marketplace; it may also undermine the evenhandedness requisite to fair competition in the marketplace. Therefore, the federal government has participated in and is continuing to encourage a growing international consensus to promote international air services through reciprocal exemption of air carriers from foreign taxes. As part of this policy, the U.S. encourages the states to exempt foreign air carriers from all taxes, in particular to avoid retaliation by foreign governments against all U.S. carriers in response to the tax policy of only one state. Senate Bill No. 8-A conflicts with this

> federal policy and the long-accepted international practice it reflects.

Telegram dated Aug. 30, 1983. Appendix L at 105a-106a.[5]

The issue could not be more sharply drawn. The United States believes that foreign airlines should be reciprocally exempted from federal, state, and local taxes on aviation fuel. The State of Florida disagrees with this policy, and has imposed a tax on aviation fuel which has the potential to disrupt United States foreign policy by undermining the Federal Government's ability to bargain with our aviation trading partners for reciprocal tax exemptions.

The Florida Supreme Court held that no conflict with federal policy existed because the bilateral agreements provided specific exemptions from national duties and charges only. The Florida Court concluded that Florida was therefore free to tax aviation fuel. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 35a-36a. But here again, the Court below simply ignored *Japan Line.*

There, the United States and Japan were parties to a multilateral convention on containers, Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, T.I.A.S. No. 6634, 338 U.N.T.S. 103, which established exemptions from customs duties and certain taxes but

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[5] The Foreign Airline Appellants moved to include this telegram in the record of this proceeding. That motion was denied. The refusal of the Florida Court to even consider the views of the United States was totally unwarranted. *See, e.g.*: *Japan Line*, 441 U.S. at 452, n.17; *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972); *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978), *cert. denied sub nom. Occidental al Qaywayn, Inc. v. Cities Service Oil Co.*, 442 U.S. 928 (1979); *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

did not specifically forbid the California *ad valorem* tax. The *Japan Line* Court drew no negative inferences from the fact that state taxes were not covered by the multilateral convention, *Japan Line*, 441 U.S. at 453-54, and no such inferences should be drawn here.[6]

The Florida Court failed to recognize that the terms of the bilateral agreements do not necessarily reflect the full scope of United States policy for two basic reasons. First, these accords are executive agreements and not treaties. When the first bilateral air transport agreements were adopted, the Congress expressed serious concern that the Executive Branch was exceeding its constitutional authority by entering into them at all.[7] Given this historical context, it is hardly surprising that the Executive Branch found it prudent to keep the scope of these agreements as narrow as possible and to refrain from dealing with state tax issues in the early agreements.

Secondly, when the basic format of the aviation agreement used by the United States was developed in the 1940's, the aviation world was much different than it is today. International airlines typically served only a few international gateway cities. There was little interest by state tax authorities in international aviation as a potential source of state revenue. Most foreign airlines purchased only bonded fuel for international flights, and such fuel was clearly not subject to any state taxes.

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[6] In *Container*, this Court condemned inconsistencies with federal directives. *Container*, 103 S.Ct. at 2955. It did not limit its preemption analysis to treaties or executive agreements.

[7] *See, e.g.*: *Civil Aviation Agreements: Hearings before the Senate Comm. on Commerce on S. 1814*, 79th Cong., 2d Sess. (1946); Senate Comm. on Commerce, Resolution, with an Accompanying Report, Relative to the So-Called Bermuda Agreement, S. Doc. No. 173, 79th Cong., 2d Sess. (1946); 92 Cong. Rec. 1126-30, 3421-28, 4040-52 (1946). *See also* Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation* (pts. 1 & 2), 17 J. Air L. & Com. 436 (1950), 18 J. Air L. & Com. 12 (1951).

McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940). The issue of state fuel taxes simply had not achieved the level of importance that it now has.

The Florida Court also ignored the specific provisions of those bilateral agreements that call on the federal government to use its best efforts to obtain exemptions from state fuel taxes. *See, e.g.*, Air Transport Services Agreement between the United States and Costa Rica, art. 9(5), Appendix K at 88a. Contrary to the analysis of the Florida Court, many of the most recent agreements are not silent on the issue of state taxes. Instead, they clearly evidence federal support for reciprocal exemption.

As *Container* pointed out, there are two aspects of the federal uniformity test. The first factor discussed in *Container*—the fact that certain taxes implicate foreign policy issues that must be left exclusively to the Federal Government even where no specific federal action has previously been taken, *Container*, 103 S.Ct. at 2955—was not even considered by the Florida Supreme Court.

The Florida tax clearly invades an area that must be reserved to the federal government. This is perhaps most easily demonstrated by reference to the likelihood of retaliation against United States carriers if taxes such as the Florida tax are allowed to stand. Foreign governments have every reason to be concerned when their flag carriers face taxes of a type not imposed on United States airlines doing business abroad. Those countries with federal systems would have good reason for concluding that they are justified in permitting imposition of taxes at the local level. Those nations without federal systems may well conclude that the degree of reciprocity afforded by the United States is inadequate or illusory. In either case, the prospect of retaliatory taxation that would undermine the international consensus that the United States has worked for years to develop is both real and serious. This is precisely the type of foreign policy

complication that the uniformity test was designed to avoid.

A further problem arises from the fact that many foreign airlines serve more than one State in the United States. There is every reason to believe that unless this Court invalidates the Florida fuel tax, other jurisdictions will impose such levies.[8] The likely result is the imposition of a number of taxes at differing rates and on differing bases by various United States jurisdictions. The confusion that would result was precisely what this Court had in mind when it observed in *Japan Line* that:

> If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.

441 U.S. at 450-51.

The Florida fuel tax also creates an unacceptable risk of multiple taxation of United States carriers. Within the United States, sales taxes and use taxes are generally viewed as reciprocals; use taxes do not normally apply to items that are subject to sales tax in other jurisdictions, or credit is given for taxes paid to other jurisdictions. Internationally, duplication between sales taxes and use taxes cannot be avoided in this manner. The United States cannot prevent foreign governments from imposing use taxes on a substantial portion of the fuel purchased and taxed in Florida. Neither can the United States require foreign governments to allow credit for taxes paid to the State of Florida. The danger of overlapping multiple taxation is clear. Even if the amount of this overlap

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[8] Indeed, Illinois State authorities moved to broaden the scope of that State's excise taxes on fuel in partial reliance on the Florida Supreme Court decision.

should prove to be small, *Japan Line* makes it clear that this would be a matter for serious concern:

> Even a slight overlapping of tax—a problem that might be considered *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned.

441 U.S. at 456 (footnote deleted).

The Florida Supreme Court cavalierly dismissed the issue of multiple taxation. *See Wardair Canada, Ltd.*, 455 So.2d at 329, Appendix B at 35a. It is true that foreign governments have not yet imposed new taxes in response to the Florida levy; but this is hardly surprising. The Florida tax is a radical departure from past practice in the United States and has only been in effect for slightly more than eighteen months. Its validity under U.S. law has been under litigation since its inception. The Florida Court had no reason to infer that multiple taxation will not occur if it becomes clear that the United States will permit Florida to tax the Foreign Airline Appellants' fuel.

In summary, Florida's unapportioned fuel tax undermines federal uniformity in an area of taxation where such uniformity is essential. It prevents the United States from speaking with one voice in its international aviation relations and raises the possibility of multiple international taxation of fuel as well as the establishment of retaliatory taxes by our trading partners. For these reasons, it is directly contrary to the Commerce Clause tests established by *Japan Line* and *Container*.[9]

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[9] We also submit that this case is not governed by the prior decisions of this Court concerning aviation fuel taxes. Those decisions (*Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147 (1932); *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249 (1933) and *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973)) held that excise taxes on aviation fuel passed constitu-

II. BY DISCRIMINATING AGAINST FOREIGN AIR COMMERCE, FLORIDA HAS DENIED THE FOREIGN AIRLINE APPELLANTS EQUAL PROTECTION OF THE LAWS

The State of Florida has discriminated improperly among different modes of transportation. In effect, Section 212.08(4) of the statute requires airlines to pay fuel tax on all of the fuel they purchase in Florida, without regard to whether the fuel is consumed in that State (or even in the United States), while ocean-going vessels—which compete directly with many of the Foreign Airline Appellants—and railroads regulated by the Interstate Commerce Commission are subject to tax only on

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tional muster because the taxable events on which those excises focused all were intrastate occurrences. Accordingly, the Court held, on the basis of *Nashville, Chattanooga & St. Louis Railway Co. v. Wallace*, 288 U.S. 249 (1933) that these taxes did not directly burden interstate commerce. In so doing, the Court distinguished the case of *Helson & Randolph v. Kentucky*, 279 U.S. 245 (1929), in which it had invalidated a Kentucky use tax on fuel purchased in another state and consumed by common carrier barges passing through Kentucky, on the grounds that this latter tax clearly involved taxation of the privilege of engaging in interstate commerce.

The direct burden analysis of these cases was repudiated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). In evaluating whether a state tax raises questions under the Commerce Clause, this Court now examines the practical effects of the tax on interstate commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). There can be no doubt that this substantial excise tax on one of the necessities of international aviation has a significant practical effect on interstate and foreign commerce.

Secondly, it should be noted that all of these cases were decided before *Japan Line*, and none of them considered the possible application of stricter standards where foreign commerce is involved. In *Eastern* and *Edelman*, it appears that foreign commerce was not at issue. In *Mahin*, only the dissenting opinion of Douglas, J. referred to foreign commerce at all. Even that discussion was framed solely in terms of the direct/indirect burden analysis that was then prevalent. *Mahin*, 410 U.S. at 632-39 (Douglas, J., dissenting).

fuel actually consumed in Florida, as determined by a mileage formula. This discriminatory approach raises serious questions under the Equal Protection Clause.

For a number of years, the courts have recognized that common carriers should be considered together as a class for equal protection purposes and receive parallel treatment. *See, e.g.: Atchison, Topeka & Santa Fe Railway Co. v. Vosburg*, 238 U.S. 56 (1915); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1897). Similarly, this Court has on several occasions approved taxation schemes involving air transportation while specifically noting that those schemes treat airlines in a manner similar to other forms of transportation. *See, e.g.: Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954); and *Eastern Air Transport, Inc. v. South Carolina Tax Commission, supra.* The law is well established that where organizations are "similarly circumstanced"—as airlines and competing surface carriers are—they are entitled to parallel treatment under the Equal Protection Clause. The Florida fuel tax fails to give equal treatment and thus offends Equal Protection precepts.

The Florida Supreme Court's only response to this issue was that there are "many obvious distinctions" between airlines and other modes of transportation and that they are "inherently and essentially different." [10] There is no indication, however, that the differences between airlines and shipping companies have any relationship to the differing tax burdens to which they are now subjected. In fact, international airlines and shipping companies perform exactly the same tasks—transporting persons, property and mail to and from foreign destinations. Indeed, they often serve the same markets. The uncontested record below demonstrates that many of the

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[10] *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311, 314 (Fla. 1984), Appendix B at 12a.

Foreign Airline Appellants compete directly with ocean-going vessels. The burdens they impose and the services they demand from the State of Florida are also similar. Both modes of transportation require the same type of facilities in Florida—terminals, maintenance facilities, sales and managerial offices. Neither type of international carrier actually travels within Florida for any substantial distance. Both types of carriers receive the same general benefits from roads and other public facilities provided by the State of Florida. Collection of a prorated tax from international shipping companies is certainly no less burdensome from an administrative standpoint and results in no larger diminution in revenues than collection of such a tax from airlines.

In short, international airlines and international shipping lines are similarly circumstanced for Equal Protection purposes and must receive substantially equal treatment. There is no rational basis for discriminating between these two competing modes of transportation. Yet this is precisely what the Florida tax has done. Accordingly, the Florida tax offends fundamental concepts of Equal Protection of the Laws.

CONCLUSION

The precepts that federal uniformity is paramount when matters of foreign commerce are involved and that persons similarly situated should be equally treated are fundamental principles consistently sustained by this Court. The Florida fuel tax flagrantly violates both of these principles. There are few areas that demand federal uniformity more than international air transportation. If unilateral state intrusion into the field of international air transportation is not resisted, the inevitable result will be a profusion of state taxes on instrumentalities of international aviation that will be certain to produce retaliation by foreign governments and to increase tax burdens on United States air carriers that provide

international service. A state law that shatters the uniformity that is essential to the conduct of international air transportation will make it substantially more difficult for the Federal Government to reach agreements with its international aviation partners, and will erode the basis for reciprocal exemption from taxation that has been a cornerstone of the international air transport system for nearly forty years. These are precisely the pernicious consequences of the Florida fuel tax. The frustration of federal uniformity and the conflict with national policy that flow from the application of this tax to foreign air carriers cannot and should not be permitted.

This Court should note probable jurisdiction.

Respectfully submitted,

ROBERT D. PAPKIN
EDWARD W. SAUER
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 626-6601
Counsel for Appellants
Lineas Aereas Costarricenses, S.A., et al.